## CHAPTER III

### The Legal Status of Slavery

Slavery in its more economic form naturally spread to the Kentucky district as the western frontier of Virginia became settled. Of the 293,427 slaves which were held in the State of Virginia in the year 1790, however, only 11,830 were in the district of Kentucky, which at that time had a total population of 73,077. Few thought, however, of disputing the rights of the institution in the newly created State. The final convention which met to form a constitution was held at Danville, beginning on April 2, 1792, and in the course of its proceedings it was apparent that there was no fundamental division among the delegates regarding any of the proposed provisions with the exception of the one dealing with slavery. Virginia had stipulated in giving permission for the formation of the new State that slavery as an established institution should not be disturbed, and this policy had the support of a majority of the members of the constitutional convention. George Nichols, a native of the Old Dominion, was the leader of the assembly and had charge of most of the work which was done and naturally was most interested in carrying out the wishes of his native State in the formation of the new document. The only serious opponent was David Rice, a noted Presbyterian minister, but, having resigned on April 11, he was not present at the time when the slavery issue came up for final settlement.

A separate vote was taken on Article IX, the slavery section, which passed 26 to 19. It was finally provided that

> The legislature shall have no power to pass laws for the emancipation of slaves without the consent of their owners, or without paying their owners, previous to such emancipation, a full equivalent in money, for the slaves emancipated; they shall have no power

to prevent immigrants to this state, from bringing with them such persons as are deemed slaves by the laws of any one of the United States, so long as any person of the same age or description shall be continued in slavery by the laws of this state: that they shall pass laws to permit the owners of slaves to emancipate them, saving the rights of creditors, and preventing them from becoming a charge to the county in which they reside; they shall have full power to prevent slaves from being brought into this state as merchandise; they shall have full power to prevent any slave being brought into this state from a foreign country, and to prevent those from being brought into this state, who have been since the first of January, 1789, or may hereafter be imported into any of the United States from a foreign country. And they shall have full power to pass such laws as may be necessary to oblige the owners of slaves to treat them with humanity, to provide for them necessary clothes and provisions, to abstain from all injuries to them extending to life or limb, and in case of their neglect or refusal to comply with the directions of such laws, to have such slave or slaves sold for the benefit of their owner or owners.[1]

In any discussion of the slavery question in Kentucky in its historical aspects this article of the first constitution is fundamental. It is evident that even at that early day the difficulty of the slavery problem was already in the minds of the people in spite of many other apparently more pressing issues. The article itself remained practically intact throughout the existence of slavery in the State. Were there ever in later years gathered within the confines of the State any body of men who had a better grasp of the future? The single instance of the recommendation that the legislature should pass laws permitting the emancipation of slaves only under the provision that they should be guaranteed from becoming a public charge to the county shows the comprehension of a difficulty that could not at such an early date have developed to any great degree, but which in later decades was a formidable problem. We may well say with John Mason Brown, however, that "the system of slavery thus contemplated was designed to be as

[1] *Littell's Laws*, 1: 32.

mild, as human, and as much protected from traffic evils as possible, but it was to be emphatically perpetual, for no emancipation could be had without the assent of each particular owner of each individual slave."[2]

The session of the State assembly which met in November, 1792, only attempted to carry out the constitutional provision prohibiting commercial transactions with slaves. No person was permitted to buy of, or sell to, any slave, any manner of thing whatsoever without a written permit descriptive of the article under the penalty of four times the value of the thing bought or sold. The jurisdiction of such cases was given to the county court, if they concerned values of more than five pounds. The slave was to receive ten lashes, which by the standards of those days was a meager punishment for any offense.[3] Whenever possible the slave was not brought into consideration as an offender. The theory seems to have been that the slave was better off when left alone. It was only when some unscrupulous outsider came in to use the slave either as a victim or as an object of profit that it was necessary to draw the strings tighter on the Negro, not because of any inherent tendency to crime so much as to keep the slave from becoming unruly when in the power of a superior influence.

It was not until the session of 1798 that the legislature drew up the fundamental slave code which was to carry out all the recommendations of the constitutional convention and which remained the basis of all legal action throughout the entire period of slavery. Among the early acts of the State had been the temporary adoption of the statutes of Virginia on the treatment of slaves and slavery problems, which were then in force.[4] These remained as a slave code for Kentucky until the enactment in 1798 of these new laws, which contained forty-three articles and involved almost every question that could come up for legal consideration in connection with the institution. The experience of six

[2] Brown, John Mason, *The Political Beginnings of Kentucky*, p. 229.
[3] *Littell's Laws*, 1: 44.
[4] *Ibid.*, 1: 161.

years as a separate State had served to show that many existing provisions of the Virginia code were not readily adapted to the rapidly growing State, and then too there was a decided tendency to ameliorate the condition of the slave as much as possible. In Kentucky they were not then, at least, confronted with such a large mass of slaves that they could not meet problems in a much easier manner than in the Old Dominion.

In the beginning, it was naturally found necessary to place some restrictions on the slave and his movements. He was not allowed to leave his master's plantation without written permission and if he did go away, any person could apprehend the offender and take him before a justice of the peace, who was empowered to order the infliction of stripes at his discretion. Furthermore, he was not to wander off to any other plantation without the written permission of his owner, with the provision in this instance that he was not to be taken before a justice of the peace, but before his owner, who was entitled to inflict ten lashes upon the offender. Should the slave be found carrying any powder, shot, a gun, club, or any weapon he could be apprehended by any free person and taken before a justice and a much severer penalty exacted in the form of thirty-nine lashes, "well laid on, on the bare back."[5] It is clear that this law was drawn up to keep the slave from becoming a public menace and not as a sign of absolute restriction on the servant, for it was further provided in Section 6 that in case the slave lived in a frontier community he could go to the local justice of the peace and secure a permit to keep and use guns, powder, shot and other weapons for either offensive or defensive purposes. This permission was to be indorsed by any free Negro, mulatto or Indian and did not necessarily involve the approval of the owner of the slave.

It was declared unlawful for slaves to engage in riots, unlawful assemblies, in trespasses or in seditious speech and, if so accused, they were to be taken before the local justice

[5] *Littell's Laws*, 2: 113.

who was to punish them at his discretion. But the Negroes themselves were not to be considered as the only guilty ones. In order to prevent any such disorderly meetings no owner of slaves was to be allowed to permit any slave not belonging to him to remain on his plantation for more than four hours at any one time under a nominal penalty to such owner of $2; but, if he allowed more than five such slaves to assemble on his property, he was to be fined more severely. If such a group were brought together by the written permission of the owner and for business reasons, however, there was involved no offense whatever.[6] It was realized that oftentimes the chief leaders in the unlawful meetings of slaves were free Negroes and sympathetic whites. Were any such to be found present they were to be arrested and if found guilty when tried before a justice of the peace, should be fined 15 shillings, to be paid, not to the court, but to the informer and if the money was not forthcoming the court was to have twenty lashes inflicted—no matter whether the convicted be white or black. Inasmuch as the degree of punishment of the slaves for being present at such a meeting was not specified it would seem that the legislature meant that the free persons involved should be treated more severely than slaves by the court.

The law of 1792 regarding trading with slaves had not proved to be effective, for in many cases the owner for a stipulated wage paid by the slave had permitted him to go at large and engage in trade as if he were a free man. The legislature found that this encouraged the slaves to commit thefts and engage in various evil practices and naturally censured the owner. A fine of $50 was to be paid by the master for each offending slave and no punishment whatever was to be given the latter. But should the servant go so far as to hire himself out, he would be imprisoned by order of the court and, at the next session of the county court, he would be sold. One fourth of the money thus received was to be applied to the county funds and 5 per cent was to be given to the sheriff and the owner was to

[6] *Littell's Laws*, 2: 114.

receive the remaining 70 per cent. Here too the slave was not punished and his condition of servitude was not changed. It was merely a change of owners. Again the offending owner was the victim and for his carelessness he was deprived of 30 per cent of the money value of his slave.[7]

The leading Kentucky case bearing on slaves engaged in trade is that of Bryant *vs.* Sheely (5 Dana, 530). Five of the main points are worth mentioning here:

1. To buy or receive any article from a slave, without the consent of his master, in writing, specifying the article, is a highly penal offense.

2. A sale made by a slave, without such written consent, is void, and does not divest the master of his property; he may sue for, and recover it; or he may waive his right to the specific thing, affirm the sale, and recover the price or value, if it was not paid to the slave.

3. A general permission to a slave to go at large and trade for himself as a free man, is contrary to public policy, and a violation of a penal statute. The owner or master of a slave could maintain no action for any claim acquired by a slave while acting under such illegal license.

4. But a slave may be permitted by his master to buy or sell particular articles, and any form of consent or permission given by the master, or his assent after the fact, will give validity to the sale—though the purchaser may be liable to the penalty, if the consent be not in writing.

5. A slave, being authorized by his master to sell any particular thing, becomes the agent of his master for that purpose; and from the authority to sell, an authority to transfer the property, and to fix and receive the price must be inferred; but the slave cannot exercise or receive an authority to maintain any action in relation to it; the right of action for the price belongs to the master, and if he sues, that fact itself is sufficient evidence that he authorized or approved and confirmed the sale.

Unlike the more southerly States, Kentucky did not leave the slave helpless in the courts. If a slave were charged with a capital crime he was brought before the court of quarter sessions, which was composed of the various county

[7] *Littell's Laws*, 2: 116–117.

justices of the peace. They were to constitute a court of oyer and terminer. But they alone were not to decide the fate of the Negro, for the sheriff was required to empanel a jury of twelve men from among the bystanders, who were to constitute the trial jury. It was explicitly stated that legal evidence in such a case would be the confession of the offender, the oath of one or more credible witnesses, or such testimony of Negroes, mulattoes, or Indians as should seem convincing to the court. When a slave was called upon to testify in such a case, the court, the witness "not being a Christian," found it necessary to administer the following charge that he might be under the greater obligation to declare the truth: "You are brought hither as a witness, and by the direction of the law I am to tell you, before you give your evidence, that you must tell the truth and nothing but the truth, and that if it be found hereafter that you tell a lie, and give false testimony in this matter, you must, for so doing, receive thirty-nine lashes on your bare back, well laid on, at the common whipping post."[8]

Section 22 of the law of 1798 provided that the master or owner of any slave might appear in court at a trial of his servant and "make what just defense he can for such slave." The only restriction was that such defense should not interfere with the form of the trial. Naturally the liberally disposed slaveholders interpreted this to mean that they could employ counsel to defend their Negroes and it remained a disputed question down to 1806, when the legislature made the provisions more specific. By this new law it was provided that it was not only the privilege but the duty of the owner of a slave who was being prosecuted to employ an attorney to defend him. The owner neglecting to do so the court must assign counsel to defend the slave and the costs thereby incurred were to be charged to the owner. The fee for defense was not to exceed $200 and if not forthcoming the court was empowered to recover the amount in the manner of any other debt of similar amount.

[8] *Littell's Laws*, 2: 117–118.

It was plainly the intention of the legislature to provide a just trial for any slave, for they even went so far as to enact that the lawyer appointed by the court for the prisoner should "defend such slave as in cases of free persons prosecuted for felony by the laws of this state."[9]

When the slave was convicted of an offense which was punishable by death but which was within the benefit of clergy the capital penalty was not pronounced, but the offender was burnt in the hand or inflicted with any other corporal penalty at the discretion of the court. Should the criminal be sentenced to suffer death, thirty days were to elapse before the execution, except where it was a case of conspiracy, insurrection or rebellion. When the court had decided to sentence the slave to the death penalty a valuation of the Negro was made. This statement was to be turned over to the State auditor of public accounts who was required to issue a warrant on the treasury for the amount in favor of the owner of the convicted party. The owner on his part was to turn over to the treasurer the certificate of the clerk of the court showing that the slave had been condemned and the statement of the sheriff that the offender had been executed or had died before execution.[10]

This matter of the payment to the owner of the value of the executed slave appears never to have been questioned to any extent even by the abolitionists in the legislature until the session of 1830 when a bill was introduced for the repeal of the law. The bill was lost but in the course of the debate it was stated that while Kentucky contained over 160,000 slaves only about one fifth of the tax-paying whites were slaveholders and that $68,000 had already been paid out of the State treasury as indemnity for slaves executed. After the defeat of this bill there was offered a substitute which proposed that a tax of one fourth of one per cent should be levied upon the value of all slaves in the State for the creation of a fund out of which to make such disbursements, but this was likewise lost.[11]

[9] *Littell's Laws*, 3: 403.
[10] *Ibid.*, 2: 117–118.
[11] *Niles' Register*, February 2, 1830.

Until 1811 there were no special enactments on slave crimes and their punishments. The court had, therefore, more or less range in the exactment of penalties but the legislature of 1811 passed during the first fortnight of its session a specific law governing slave crimes. Only four offenses were to be regarded as punishable by death: (1) conspiracy and rebellion, (2) administering poison with intent to kill, (3) voluntary manslaughter and (4) rape of a white woman. If any slaves were to be found guilty of consulting or advising the murder of any one, every such consultation was to constitute an offense and be punishable by any number of stripes not exceeding one hundred.[12]

As time went on the list of capital crimes was increased as a natural result of the growth of the slave population and their growing state of unrest after the incoming of the anti-slavery propaganda. By the close of the slavery era in Kentucky there were eleven offenses for which slaves should suffer death: (1) murder, (2) arson, (3) rape of a white woman, (4) robbery, (5) burglary, (6) conspiracy, (7) administering poison with intent to kill, (8) manslaughter, (9) attempting to commit rape on a white woman, (10) shooting at a white person with intent to kill, and (11) wounding a white person with intent to kill. It will readily be seen that from a practical standpoint these eleven offenses can be narrowed down to eight. The severity of the slave code can be shown by comparison of the capital crimes for white persons at the same time. These were four in number, (1) murder, (2) carnal abuse of a female under ten years of age, (3) wilful burning of the penitentiary and (4) being an accessory to the fact.[13]

Virginia had early enacted that slaves should be considered as real estate in the settlement of inheritances. But the growing tendency to look upon the slaves in all things else as personal chattels led to such legal and popular confusion that the Virginia assembly often observed that they were "real estate in some respects, personal in others, and

[12] *Littell's Laws*, 4: 223–224.

[13] Stroud, *Laws relating to Slavery*, p. 86.
Littell & Swigert, 2: 1066–9; 1060–4.

both in others." Regardless of such legal complexity it was not until 1793 that it was enacted that "all negro and mulatto slaves in all courts of judicature shall be held and adjudged to be personal estate."

In drawing up the slave code of 1798 Kentucky disregarded the legal experience of Virginia and her more recent remedial legislation and enacted that "all negro, mulatto or Indian slaves, in all courts of judicature and other places within this commonwealth, shall be held, taken and adjudged to be real estate, and shall descend to the heirs and widows of persons departing this life, as lands are directed to descend." It was further provided, however, that "all such slaves shall be liable to the payment of debts, and may be taken by execution for that end, as other chattels, or personal estate may be."[14]

Such a law coupled with the legal precedents of Virginia served to intensify the mixed property conception of the slave. The confusion, however, was purely legal, for slaves were held in all other respects as personalty; but in cases of inheritance and the probation of wills the Kentucky Court of Appeals was often called upon to define clearly the legal status of the Negro in bondage. The first important decision was handed down in 1824 in the case of Chinn and wife *vs.* Respass, in which it was pointed out that while slaves were by law made real estate for the purpose of descent and dower, yet they had in law many of the attributes of personal estate. They would pass by a nuncupative will, and lands would not; they could be limited in a grant or devise no otherwise than personal chattels; and personal actions might be brought to recover the possession of them.

[14] It would perhaps be well to point out here the general common-law difference between the treatment of real and personal estate in a will. The title of the personal property of the deceased is vested in the executor and he holds it for the payment of debts and distribution according to the will of the testator. On the other hand the real estate vests in the devisees or heirs and does not go to the administrator, unless by statute enactment, which was in part true in Kentucky, in the case above, where the slaves, although real estate, were held liable for the debts of their master. *Littell's Laws*, 2: 120.

Furthermore "they were in their nature personal estate, being moveable property, and as such might attend the person of the proprietor wherever he went; and in practice they were so considered by the people in general."[15]

Conversely, the court was often called upon to interpret the phrase "personal estate" in wills and contracts, where it appeared without any other restrictive expression or provision, and it consistently held that the term should be construed as embracing slaves.[16] Gradually the personal property conception began to secure even legal precedence over that of real estate when the two interpretations came into close conflict. This was accomplished by placing more stress on the proviso in the original slave code, which placed slaves in the hands of the administrator as assets for the payment of debts. This led to increasing power for the executor who could even defeat the title of the heirs, though the property may have been specifically devised. Hence it was not surprising that in the Revised Statutes of 1852 it was provided that slaves should thereafter be deemed and held as personal estate. Coming after all doubt of the personalty of slaves had been removed by the decisions of the highest tribunal in the State, this law meant little more than the repeal of the old statute making slaves real estate.

The wonder is that Kentucky should have chosen to hold to an antiquated legal conception for fifty years after Virginia had proved its fallacy by her experience in the eighteenth century. While it did little harm, it had few advantages. The existence of the theory was chiefly noticeable in the frequent legal battles over technicalities in the settlement of estates. In the popular mind slaves were always considered personal property, and the spirit of the slave code itself embodied that conception as regarded all things save the question of inheritance.

With respect to the liberty of the slaves the code of

[15] *T. B. Monroe's Report I.*, 23.

[16] Beatty *vs.* Judy, 1 Dana, 101.
Plumpton *vs.* Cook, 2 A. K. Marshall, 450.

1798 clearly shows that the existing type of slavery was purely rural, for the restrictions on slaves concerned only the plantation Negroes. Strictly understood, the slave was not to leave the farm of his owner without a pass from his master, the main purpose being to keep the Negroes from congregating on any one farm. Later when emissaries from the North became unusually active the rights and privileges of the slaves were further restricted. This change was due to the current belief that these foreign individuals were bent upon stirring up strife among the slaves and inciting them to insurrection. Once started such a scheme would have resulted in anarchy especially in the towns. The real curbing provisions were not started until along in the thirties when these outside forces had begun to make their appearance in the urban communities.[17]

In some parts of the State were instituted mounted patrols, who went about at night and watched the movement of slaves. They were to apprehend any servant who was caught away from his home plantation without a pass from his master.[18] Such an institution was based on good Negro psychology, for his fear of the spirits of night was well known. Citizens of that time have told us many tales of the dread which the slave had of meeting these night raiders whom they termed "patter-rollers" and how they came to sing of them in true Negro fashion:

Over the fence and through the paster,
Run, nigger, run, oh, run a little faster,
Run, nigger, run,
The patter-roller ketch you.

Such a system of county patrols did not prove to be sufficient as the slave population grew and the towns became larger and more attractive to the country slave. The legislature of 1834 in drawing up a law concerning tavern keepers had this problem clearly in mind when they provided that no person should sell, give or loan any spirituous liquors to

[17] Rothert, *History of Muhlenburg County*, p. 343.
[18] Young, B. H., *History of Jessamine County*, p. 89.

slaves, other than his own, under a penalty of $10 for each offense. Furthermore, if the offender was a licensed liquor dealer, he should have his license taken away from him for the term of two years.[19] That even this measure did not prove effective enough to curb the evil of Negroes congregating in the towns is shown by the further provision passed March 6, 1850, to increase the fine to $50 for each offense.[20] A still further extension was that of February 27, 1856, which provided that free Negroes were to be included in the restriction unless they presented a certificate from "some white person of respectable character." No slaves or free Negroes were to be employed in the selling or distribution of liquor nor were they to be allowed to visit or even loaf around any place where intoxicants were kept for sale.[21] The session of 1858 made the force of the law more explicit by defining very clearly the jurisdiction in such cases.[22]

Not only the State authorities but the towns as well were active in the measures adopted to meet the growing problem. The best available sample of the many provisions which the town councils drew up is this one which was passed by the trustees of Henderson in 1840:

> It shall be and is hereby made, the duty of the Town Sergeant or either of his assistants, to punish with any number of lashes not exceeding ten, all or any negro slave or slaves who may be found in any grog shop, grocery or other place where spirituous liquors are retailed in said town, or who may be found on the streets of said town after ten o clock at night, unless it shall appear to the said Town Sergeant, or assistant, that said negro slave or slaves, are acting under the orders of his, her or their master or mistress, and it shall further be the duty of the Town Sergeant, or either of his assistants, to enter into any grog shop, grocery or other place where spirituous liquors are retailed, in said town, whenever he shall be informed that any negro slave or slaves are collected therein. Provided, said Town Sergeant, or assistant, can enter the same peaceably and without force.[23]

[19] Session Laws, 1834, p. 726.
[20] *Ibid.*, 1850, p. 51.
[21] *Ibid.*, 1856, Vol. 1, pp. 42–44.
[22] *Ibid.*, 1858, Vol. 1, pp. 47–48.
[23] Starling, p. 290.

This town regulation offers perhaps another proof of the oft-repeated statement regarding the slave laws of Kentucky that while they appeared severe on the statute books they were always mild in the enforcement. The regulation of the movement of slaves in the towns was always subject to the local conditions. Beginning about 1850 there was a growing feeling in some of the more thickly populated sections of the State that the type of Negro slave who sought to frequent the village saloons would sooner or later start an insurrection. But no such uprising ever occurred and the fear of such seems to have been due to the current animosity towards the activities of the abolitionists, which was prevalent throughout the State.

In the course of time it was considered necessary to treat more seriously also the importation of slaves. The advisability of preventing the importation of bondmen had been foreseen in Kentucky from the experience of the mother State of Virginia which had enacted a stringent law in 1778 imposing a penalty of one thousand pounds and the forfeiture of the slave upon the importer of any into that commonwealth. The ninth article of the Kentucky Constitution of 1792 had provided that the legislature "shall have full power to prevent slaves being brought into this commonwealth as merchandise; they shall have full power to prevent any slave being brought into this state from a foreign country, and to prevent those from being brought into this state, who have been since the first of January, 1789, or may hereafter be imported into any of the United States from a foreign country."[24]

The session of the State assembly in 1794 drew up a law concerning the importation and emancipation of slaves but it was largely a mere modification of the law of the State of Virginia. It was not until the adoption of the slave code of 1798 that the question was firmly settled by a more definite statement. By article 25 of that act it was provided "that no slave or slaves shall be imported into this state

[24] *Littell's Laws*, 1: 32.

from any foreign country, nor shall any slave who has been imported into the United States from any foreign country since the first day of January, 1789, or may hereafter be imported into the United States from any foreign country under the penalty of $300."

This was merely carrying out the provisions of the constitution. Section 26 provided that "no slave or slaves shall be imported into this state as merchandise, and any person offending herein, shall frofeit and pay the sum of $300 for each slave so imported, to be recovered by action of debt or information, in any court having cognizance of the same, one half to the prosecutor, the other half to the use of the commonwealth." More significant was the proviso that "this act shall not extend to prevent any citizen of this state bringing for his own use, provided, they have not been brought into the United States from any foreign country since January 1, 1789; nor shall it be construed to prevent persons emigrating to this state bringing their slaves with them, but either a citizen of this state or persons emigrating to this state may bring slaves not prohibited by this act."[25]

An act of 1814 amended the above by prohibiting the importation of slaves by any of the emigrants if they did not intend to settle in Kentucky.[26] An attempt was made by a law of February 8, 1815, to remedy some of the defects which had been found. The legal penalty for importation was increased to $600 for each slave imported and a fine of $200 was added for every person buying or selling such slave. No indictment was to be subject to a shorter limitation than five years and once so accused no person was to be discharged or acquitted unless he could produce evidence to show that within sixty days of his arrival in Kentucky he had deposited the following oath, duly signed, in the county clerk's office where he resides: "I, ....., do swear that my removal to the state of Kentucky was with the intention of becoming

[25] *Littell's Laws*, 2: 119.
[26] *Ibid.*, 5: 293.

a citizen thereof, and that I have brought no slave or slaves to this state, with the intention of selling them."[27]

It is evident from all contemporary discussions of the question of importation that it was the firm conviction that in order to do justice to the slave and the institution as a whole within the State it was necessary to prevent the infusion of any foreign slave element. Once such a policy had been carried out to a successful conclusion, they would have been confronted only with a purely domestic type of slavery and its increase. With such an ideal condition, for those times, the institution eventually would have been easily handled. But these early lawmakers, while no doubt honest in their intentions, did not have the wisdom that was tempered with experience, and the unscrupulous slave traders found further defects in the law and took advantage of them. A careful examination of the law of 1794, the codification of 1798, and the amendments of 1814 and 1815 will show that the whole theory of non-importation is summed up in the word *intent*. It was the intent with which the slaves were introduced, and to this alone the penalty attached. They were not to be imported as merchandise but every citizen could import slaves for his own use. Once these slaves were within the State there was no penalty provided if they were sold. There was nothing to prevent a man from selling what slaves he had imported and later going without the confines of the State and bringing in more. If he were brought before the court, he would claim that he had not intended to sell them when they were brought in, and no one could place a penalty on his intentions. It seems that there were other violators of the spirit of the law, who never sold any of the slaves but brought them into the State in large numbers and then hired them out for such long terms as 99 years.[28] The fundamental idea of the law had been to place a curb on the increase of the slave population by importation and these acts were in direct opposition to the intention of the enactments.

[27] *Ibid.*, 5: 435–437.

[28] Barre, W. L., *Speeches and Writings of Thomas F. Marshall*, p. 115.

An index of the inefficiency of the existing provisions regarding importation can be found in the figures on the growth of the slave population during this period when it is borne in mind that legally slaves could not be imported, except for personal use, after the year 1794. The slave population in 1790 had been 11,830 and by 1800 had increased to 40,343 or at the rate of 241.02 per cent; in 1810 there were 80,561 slaves or an increase of 99.69 per cent; in 1820 there were 126,732, a gain of 57.31 per cent; and by 1830 they had increased 30.36 per cent to a total of 165,213. During the same period there was a great increase in the white population but it was always from 20 per cent to 40 per cent below that of the slaves. It appears that the law prohibiting importation was not as effective as it should have been. While none of the statesmen appear to have figured from the statistical viewpoint there was no end of discussion regarding the necessity of extending the law to include more than the question of intent at the time of importation.

The avowed resolution of Kentucky to deal with the slavery question in the most humane manner and to stop any unscrupulous dealing in slaves for the mere sake of profit is nowhere more clearly shown than in the firm action which was taken not only in the court room but in the legislative halls when it was found that advantage had been taken of the letter of the law at the expense of its spirit. On February 2, 1833, the legislature passed a law prohibiting all importation of slaves even for personal use. The only exception provided in this case was that emigrants were allowed to bring in slaves, if they took the oath that had been provided in the law of 1815. The evil mentioned above brought about by hiring slaves for excessively long terms was prohibited by declaring illegal any contract which extended beyond one year and exacting a penalty of $600 for each offense. This law of 1833 was destined to be the crux of many a heated argument for the remainder of the slavery period. Many a candidate for office during the

next thirty years rose to victory or fell in defeat because of his position with regard to this one statute of the State. It was the briefest of all the enactments on the slavery question but it was by far the most important and far-reaching provision that the legislature ever enacted in connection with the institution.[29]

It is noticeable that this measure was not brought about in any sense by the activities of the abolitionists, for they had not at that time made their appearance in the State. It was an honest endeavor on the part of the native population, slaveholding as well as non-slaveholding, to carry out the spirit of their State constitution which had been adopted back in 1792. Thomas F. Marshall, who later was the leader of the Lexington group which removed Cassius M. Clay's *True American* to Cincinnati, has borne testimony to the fact that the slaveholding element voted for the law of 1833. "At the time of the passage of this law," said he, "the sect known by the title of 'abolitionists' had not made their appearance. And, as I was sworn then upon the constitution of my country, by all the obligations of that oath, I affirm now that I do not believe that the principles and designs ascribed to that party were in the contemplation of any human being who voted for the law. I was myself not only never an abolitionist, but never an emancipationist upon any plan which I ever heard proposed."[30]

But the question was not settled for all time, for with the coming of the abolitionist element there was a general tendency throughout the State to enact stricter laws governing slaves. Many who had voted for the enactment began to cry for a repeal of the law, but it was not until the session of 1841 that it was seriously debated in the general assembly.

[29] Section 1 of the law 1833 read: "Each and every person or persons who shall hereafter import into this state any slave or slaves, or who shall sell or buy, or contract for the sale or purchase, for a longer term than one year, of the service of any such slave or slaves, knowing the same to have been imported, shall forfeit and pay $600 for each slave so imported, sold, or bought, or whose service has been so contracted for; recoverable by indictment of a grand jury or any action of debt, in the name of the Commonwealth in any circuit court, where the offenders may be found." Session Laws, 1833, pp. 258–261.

[30] Barre, W. L., p. 116.

Then after a long and ardent discussion in the House of Representatives a vote was taken on the ninth of January—with 34 in favor of the repeal and 53 against it. Never within the previous decade had a bill before the House produced such popular interest.[31] It came up in the Senate at the session of 1843 but after another warm debate it failed by a vote of 14 to 21. Sentiment for the repeal continued to grow and in 1849 the law was amended so as "no longer to prohibit persons from purchasing and bringing into the State slaves for their own use."[32] This changed the situation back to what it was before 1833, for it will be recalled that the main feature of the law of 1833 compared with that of 1815 was the prohibition of importation even for personal use. It could easily have been predicted that such an amendment would pass, for the legislature of 1847 had passed 27 distinct resolutions granting to as many individuals the right to import slaves for personal use. The session of 1848 made 24 similar provisions.

This apparently radical swing towards the side of the slave owner in 1849 was more than likely brought about by the very intense campaign which was carried on by the emancipationists. Such a movement served to unite the slave forces against any attack upon the institution. This tendency was shown not only in the halls of the State legislature but in the constitutional convention which met later in the same year. Although the abolitionists had looked forward to some advanced constitutional provisions on emancipation and the inclusion of the law of 1833 in the organic law of the State they were astounded to be met with the virtual repeal of that statute by the legislature. On the other hand the constitutional convention not only rejected bodily all the reform measures but added to the Bill of Rights this extraordinary amendment: "The right of property is before and higher than any constitutional sanction, and the right of the owner of a slave to such slave and its increase is the same and as inviolable as the right of the owner of any property whatsoever."

[31] *Niles' Register*, January 23, 1841.

[32] Collins, Vol. 1, p. 83.

The slave trader once more had the courage to appear in the State. Richard Henry Collins in an editorial in the *Maysville Eagle,* November 6, 1849, gives us some vivid evidence of the effect which the repeal of the law of 1833 had had in a few weeks' time. "A remarkably forcible and practical argument in favor of incorporating the negro law of 1833 into the new constitution reached this city in bodily shape on Sunday, per the steamer *Herman* from Charleston, Virginia. Forty-four negroes—men, women and children —of whom seventeen men had handcuffs on one hand and were chained together, two and two, passed through this city for the interior of the State, under charge of two regular traders. We opine that few who saw the spectacle would hereafter say aught against the readoption of the anti-importation act of 1833." Such scenes as this were the result of the passage of an innocent-looking measure which allowed citizens to import slaves for their own use, but which could really be made to include almost any influx of slaves.

No further change in the importation laws was made until the crisis immediately preceding the Civil War, when practically all opposition was removed and the law of 1833 was abolished in its entirety.[33] Explanations of the sudden turn of mind are not hard to find for the enactment was passed amid the turmoil and chaos brought on by an impending war and the radical slaveholders found it easy to get votes for their side in a last vain endeavor to save the institution, not so much from an economic standpoint as from a matter of principle. The last chapter in the legal history of the importation problem in Kentucky, however, had not yet been written. After three years of the armed conflict between the North and the South, Kentucky, which had remained loyal to the Union and fought against the slave power of the South, reenacted on February 2, 1864, the old law of 1798 on the prohibition of the importation of slaves.[34] The wording was somewhat different, but the

[33] Session Laws, 1860, Vol. 1, p. 104.

[34] *Ibid.,* 1864, pp. 70–72.

essential provisions were the same. Coming at such a time, it never had any significance in the slavery problem in the State, but it is interesting as one of the last vain efforts of the institution before it was mustered out of the State by an amendment to the federal constitution, which was passed without the assent of the State legislature of Kentucky.

No less serious than the question of importation was the problem of the fugitive slave. This has been treated many times and every discussion of it has involved much of what transpired in Kentucky or on its borders. It is not the purpose here to repeat any of that story because it belongs rather to the anti-slavery field, and, furthermore, has been recently very well treated by A. E. Martin in his *Anti-slavery Movement in Kentucky*. We are here concerned with the legal phase of the fugitive problem as it existed in Kentucky throughout this period, as an internal question; in the relation between the State and other States; and between the State and the federal authorities. In so far as it relates to the law within the State such a discussion naturally divides itself into two phases—those measures which affected the fugitive slave himself, and those which were directed towards conspirators who might have brought about the escape of slaves. The former group of laws were enacted, for the most part, in the early days of statehood, for a runaway slave was a natural evil in any condition of servitude. The latter group of measures were passed in the later days of the institution when the anti-slavery propagandists came in from the North, for until then there were no cases of enticement. A large majority of those who were placed on trial for conspiracy in the history of slavery in Kentucky proved to be outsiders who had come into the State after 1835. The citizens of the commonwealth who were opposed to the institution were satisfied to confine themselves to mere words advocating the emancipation of slaves.

The State early adopted the slave code of Virginia in regard to the treatment of runaway slaves just as it did in

regard to the general legal rights of the bonded Negro but provided more drastic regulations in 1798. Any person who suspected a Negro of being a runaway slave could take him before a justice of the peace, and swear to his belief in the guilt of the accused. Being provided with a certificate from the justice where he found the slave, the apprehender could then take the fugitive back to the owner and might collect ten shillings as a reward and an additional shilling for each mile of travel necessary in bringing the slave to the master. If the money should not be paid. the person entitled to it could recover the sum in any court of record in the State upon the production of his certificate of apprehension as legal evidence.[35]

In many cases the runaway could not be identified as the property of any particular owner, so provision was made for the commitment of the offender to the county jail. The keeper was forthwith to post a bulletin on the courthouse with a complete description of the Negro. If at the end of two months no claimant appeared the sheriff was to publish an advertisement in the *Lexington Gazette* for three consecutive months so that the news of capture would reach a larger public. In the meantime the sheriff was authorized to hire out the fugitive and the wages thus received were to pay for the reward of the captor and the expenses incurred by the county officials. If the owner appeared during the period and proved his property, he could have the slave at once in spite of any labor contract, providing he would pay any excess of expenses over wages received. But often the master never appeared and if a year had expired since the last advertisement had been published in the *Gazette*, the sheriff could sell the slave and place the proceeds of the sale plus the wages received over the expenses, in the county treasury. This sum was credited to the unknown owner, for if he should appear at any future time the county would reimburse him for his loss, otherwise the fund reverted to the county.[36]

[35] *Littell's Laws*, 2: 5–6.
[36] *Ibid.*, 2: 5–6.

This legal code for the apprehension of runaway slaves remained practically unchanged throughout the period of slavery. The only amendments which were ever made were those for the increase of the reward to the captor and it is significant that the first of these changes did not come until more than a generation later in 1835. Then the compensation was divided into three classes: for those captured in their own county, $10; in another county, $20; out of the State, $30.[37] Just three years later it was found necessary to increase this by the following interesting law: "The compensation for apprehending fugitive slaves taken without this commonwealth, and in a State where slavery is not tolerated by law, shall be one hundred dollars, on the delivery to the owner at his residence within this commonwealth, and seventy-five dollars if lodged in the jail of any county in this commonwealth, and the owner be notified so as to be able to reclaim the slave."[38] There were no more advances until a law of March 3, 1860, increased the reward to one hundred and fifty dollars if the slave were caught outside the State and brought back to the home county; one hundred and twenty-five dollars if caught outside the State and brought back to any county in Kentucky; and twenty dollars if caught anywhere in the home county.

The trend of these laws, from the viewpoint of the rewards alone, shows the increasing importance of the fugitive problem to the slaveholding group. It is noticeable that from the year 1798 until 1835 there was not sufficient pressure upon the State legislature to increase the reward to the captor of a runaway. It is further evident from the scarcity of contemporary advertisements that there were comparatively few Negroes who ventured forth from the neighborhood of their masters. But with the rise of the anti-slavery movement in the North and the growth of abolition sentiment as expressed by the apostles of Negro freedom who had come from across the Ohio, the slaves tended to run away in ever-increasing numbers. This was soon

[37] Session Laws, 1835, pp. 82–83.
[38] *Ibid.*, 1838, p. 158.

followed by a more rigid policy of apprehension upon the part of the Kentucky legal authorities, apparent in the increasing reward.

Not all cases of fugitives were to be reached by a mere system of capture and reward. Rarely did a slave make his escape into a free State without the aid of some one in sympathy with him. Hence the need for legal machinery to punish those who assisted runaways. From a chronological point of view the laws governing such cases divide themselves into two parts; in the early days they refer to those who would help a slave who had already escaped; in the later period they were directed towards those who induced slaves to leave their home plantations.

Whichever of the free States he tried to reach it was necessary for the Negro to cross the Ohio River to get to his haven of refuge. If the Kentucky authorities could prevent him from crossing the stream on the northern and western boundary, they could prevent any slave from making a successful escape. Consequently the legislature as early as 1823 attempted to solve the problem by passing a law forbidding masters of vessels and others from employing and removing Negroes out of the State.[39] This act prevented runaways from securing work on a steamboat with the specific purpose of leaving once they were on free soil. But as usual this enactment was not effective, because there was a loop-hole in it. The State assembly in 1831, therefore, provided that no ferryman on the Ohio River should transport slaves across from Kentucky. No other person, not owning or keeping a ferry, was to be permitted to set slaves over, or to loan them boats or watercraft. Slaves could only cross the river when they had the written consent of their masters. Each and every owner of a ferry was required to give bond in the sum of $3,000 to carry out the spirit of the law; and for every violation he was subject to a fine of $200.[40]

[39] Session Laws, 1823, p. 178.

[40] *Ibid.*, 1831–2, pp. 54–55.

Not content with their previous efforts the general assembly of 1838 went still further and prohibited slaves from going as passengers on mail stages or coaches anywhere within the State, except upon the written request of their owners, or in the master's company. The liability for the enforcement of the law rested upon the stage proprietors, who were to be fined $100 for each slave illegally transported.[41]

No stringent laws were made against the enticement of slaves to run away until 1830 when the abolitionists first began to appear. Until that time there seems to have been no need for any legal enactment regarding the question. The only trouble previously had been with the whites and free Negroes who aided a slave already on his way to the North. It was in response to the popular demand that on Jaunary 28, 1830, the State legislature provided severe penalties for any person found guilty of (1) enticing a slave to leave his owner, (2) furnishing a forged paper of freedom, (3) assisting a slave to escape out of the State, (4) enticing a slave to run away, or (5) concealing a runaway slave. Should a person be suspected of any one of these offenses and not be found guilty, he was to give security for his good behavior to avoid all accusation in the future.[42]

The most interesting legal case based on this law was that of Delia Webster, a young lady from Vermont, who was tried in the Fayette Circuit Court in December, 1844, for the enticement of a Negro slave boy from Lexington. The details of the trial show that the court was just and fair in spite of the fact that both Miss Webster and her copartner, Calvin Fairbank, were not citizens of the State and had furthermore used all kinds of deceit to accomplish their purpose. For the sake of aiding one Negro slave boy to reach freedom they went to the expense and trouble to feign an elopement to Ohio via Maysville, but the Lexington authorities caught them as they were coming back on the Lexington Pike near Paris. At the trial it was shown

[41] Session Laws, 1838, p. 155.

[42] *Ibid.*, 1830, pp. 173–175.

that Fairbank was in Kentucky for no other reason than to induce slaves to escape to the North and that Miss Webster had come to Lexington as a school teacher merely as a cloak for her abolitionist work. The evidence offered by the prosecution was damaging in the extreme. The defense put forth no data for her side at all, evidently preferring to be hailed as a martyr to the cause for which she stood. The jury brought in a verdict of guilty and she was sentenced to serve two years in the State penitentiary.[43]

The young accomplice, Calvin Fairbank, proved to be the most persistent abolitionist the Kentucky authorities ever encountered. He pleaded guilty to the indictment as charged and was sentenced to serve 15 years in the penitentiary, to which he was taken February 18, 1845. Evidently convinced that he had been punished sufficiently Governor John J. Crittenden pardoned him August 23, 1849, on condition that he leave the State at once.[44] But such an ardent young enthusiast for the cause of Negro freedom soon found that there were other slaves who were in need of his aid and on November 3, 1851, he came across from Jeffersonville to Louisville under the cover of night and "kidnapped" a young mulatto woman who had been doomed to be sold at auction.[45] Presumably in the hope of rescuing other slaves he remained in the vicinity for several days until on the morning of November 9 he was arrested by the Kentucky authorities. Fairbank was placed in jail pending his trial, which took place in the following March, when he was again sentenced to serve 15 years at hard labor in the State penitentiary. He began his term March 9, 1852.[46] This time he was not so fortunate in an early release. The chief executives of the State from time to time refused to pardon him. In April, 1864, Governor Bramlette was called to Washington by President Lincoln for a

[43] *Western Law Journal*, 2: 232–235 (best report of the trial).
*Niles' Register*, December 21, 1844.
Webster, Delia A., *Kentucky Jurisprudence*, pp. 1–84.
[44] Fairbank, *How the Way was Prepared*, pp. 53, 57.
[45] *Ibid.*, p. 85.
[46] *Ibid.*, p. 103.

conference and Richard T. Jacobs, the Lieutenant-Governor, became the acting Governor. This son-in-law of Thomas H. Benton had taken more or less pity on Fairbank, for he had stated to the prisoner that if he ever became the chief executive he would release him. The opportunity thus being presented for the first time, Jacob pardoned Fairbank on April 15, 1864, after a continuous imprisonment of twelve years. Such was the experience in Kentucky of an ardent northern abolitionist who boasted that he had "liberated forty-seven slaves from hell."[47]

The systematic stealing of slaves from Kentucky had begun about 1841 and at the time of the Webster and Fairbank trial was at its height. This movement was one of the results growing out of the animosity created by another legal case which occurred in 1838—that of the Rev. John B. Mahan of Brown County, Ohio. This Methodist minister, although living in the State of Ohio, was indicted by the grand jury of Mason County, Kentucky, for having aided in the escape of certain slaves. Governor Clark, of Kentucky, then issued a requisition on the Governor of Ohio for Mahan as a "fugitive from justice." Upon receipt of the demand, the chief executive of Ohio immediately issued a warrant for the arrest of the minister. A short time later he became convinced that this step had been too hasty, because Mahan had never been in Kentucky. His offense had merely consisted in helping runaways along the "underground railroad," once they were on free soil.

Hence, Governor Vance sent a special messenger to the chief executive of Kentucky redemanding the alleged fugitive from justice. Governor Clark made this very cordial and diplomatic reply:

> The position assumed by you in relation to the fact of Mahan having never been within the limits of Kentucky is clearly correct, and if upon the legal investigation of the case it be found true, he will doubtless be acquitted. I feel great solicitude that this citizen of your state, who has been arrested and brought to Kentucky,

[47] Fairbank, pp. 144, 149.

upon my requisition, shall receive ample and full justice, and that, if upon legal investigation he be found innocent of the crime alleged against him, he shall be released and set at liberty. I will, therefore, address a letter to the judge and commonwealth attorney of the Mason Circuit, communicating to them the substance of your letter, and the evidence which you have transmitted to me.[48]

The efforts of the Governor of Ohio were eventually successful, for in spite of his slaveholding sympathies Governor Clark wrote to the judge of the Mason Circuit and the latter charged the jury in no uncertain terms regarding the jurisdiction in the case. After a trial of six days Mahan was acquitted.

The importance of this case does not rest in the trial and its events but rather in the reactions which it had upon the Kentucky populace. No one doubted that Mahan was guilty of aiding slaves; but it was seen that he had been shrewd enough to confine his activities to the State of Ohio, where the Kentucky authorities had no jurisdiction. In his opening message to the State legislature, which met the next month after the acquittal of Mahan, Governor Clark voiced the sentiment of a large majority of Kentuckians. Bear in mind that these words came from the same man who a month before had advised the Circuit judge of the illegality of the Mahan indictment.

Some of the abolitionists of an adjoining state, not contented with the mere promulgation of opinions and views calculated to excite a feeling of disaffection among our slave population, and to render this description of property insecure in the hands of its proprietors, have extended their operations so far as to mingle personally with our slaves, to enter into arrangements with them, and to afford them the means and facilities to escape from their owners. This flagitious conduct is not to be tolerated—it must be checked in its origin by the adoption of efficient and energetic measures, or it will, in all human probability, lead to results greatly to be deprecated by every friend to law and order. This demon-like spirit that rages uncontrolled by law, or sense of moral right, must be

[48] *American Anti-slavery Society Report*, 1839, p. 90.

overcome—it must be subdued; its action in the state should be prohibited under such penalties as will effectually curb its lawlessness and disarm its power.[49]

In pursuance of this and similar recommendations the State legislature early in 1839 despatched a delegation of members to the general assembly of Ohio then meeting at Columbus. These men were charged to secure a law in Ohio for the better security of Kentucky fugitive slave property. The Kentucky officials had always been confronted with the problem of recovering runaways captured in Ohio, even when they personally knew the captive. The old law of 1807 in Ohio was never lax in the enforcement, but the plea of habeas corpus was habitually used for the defendant and, furthermore, it often happened that the necessary proofs of ownership were not in evidence. These facts coupled with the publicity of the Mahan trial brought about the peculiar legislative commission from Kentucky.

Here was a delegation from a slave commonwealth sent to a free State to demand a rigorous fugitive slave law for their own benefit. The Kentucky committee went even further and suggested the provisions of the proposed enactment—and the remarkable thing was that they actually succeeded. Although Ohio was known to be the home of anti-slavery interests the law passed without any difficulty. By its provisions a slave owner or his agent could appear before any judge, justice or mayor, who was authorized to issue a warrant to any sheriff in Ohio calling upon him to arrest the fugitive and bring him before any judge in the county where caught. Upon proof of his ownership to the court the owner was entitled to a certificate for removal. A heavy fine and imprisonment were the penalty for any interference with the execution of either the warrant or the removal of the slave. The vote on this measure in the House of Representatives was 53 to 15. There has been made an analysis of this roll call, which shows that the opposition all came from northern Ohio—whereas those in

[49] *American Anti-slavery Society Report*, 1839, pp. 93–94.

the southern part of the State voted for it because they were not inclined to allow any disturbance of the friendly commercial relationship which they had with their neighbor State to the south. Moreover, they objected to their locality being used as a place of refuge for unfortunate Negroes.[50]

Henceforth Ohio became a veritable hunting ground for fugitive slaves, but the wiser of the Negroes and the abolitionists diverted their efforts to other fields of escape, especially through Indiana and Illinois. The legal authorities at this time began to realize that their hope lay in the enactment of a federal law but no definite steps were taken until after the affair of Francis Troutman at Marshall, Michigan, in January, 1847. Troutman came from Kentucky to Michigan to bring back six runaways that had been located at Marshall. When he had found them and was about to take them before a magistrate for identification, a crowd of citizens of the town put in their appearance and threatened injury to Troutman and his three Kentucky companions. Although the latter were acting in accordance with the law the mob would not let them proceed in any manner—not even to appear before the magistrate—but demanded that they leave town within two hours. In the meantime they were all four arrested, tried and found guilty of trespass.[51] When these events were reported back to Kentucky mass meetings were held throughout the State in protest against the Michigan action. The State legislature drew up a resolution calling upon Congress to enact a new fugitive slave law.[52] The Senate referred the petition to the Committee on Judiciary and they later reported a new fugitive slave bill which was read twice and then pigeonholed. The same action was repeated at the next session in 1849.

The general feeling in Kentucky was intensified just at this time by a decision of the United States Supreme Court in the case of Jones *vs.* Van Zandt, which had been pending in various courts for five years. In April, 1842, John Van

[50] Chaddock, F. E., *Ohio before 1850*, p. 86.
[51] McMaster, *History of the United States*, Vol. 7: 262–263.
[52] Senate Document No. 19, 30th Congress, 1st Session.

Zandt, a former Kentuckian, then living in Springdale just north of Cincinnati, was caught in the act of aiding nine fugitive slaves to escape, and one of them got away even from the slave catchers. Consequently Wharton Jones, the Kentucky owner, brought suit against Van Zandt in the U. S. Circuit Court under the federal fugitive slave act of 1793 for $500 for concealing and harboring a fugitive slave. The jury returned a verdict for the plaintiff in the sum of $1,200 as damages on two other counts in addition to the penalty of $500 for concealing and harboring. Salmon P. Chase was the lawyer for Van Zandt and in a violent attack on the law 1793 he appealed to the U. S. Supreme Court on the grounds that this statute was repugnant to the Constitution of the United States and to the sixth article of the Ordinance of 1787. Van Zandt in the appeal had the advantage of the services of William H. Seward in addition to Chase while Jones was represented by Senator Morehead, of Kentucky. Justice Levi Woodbury in rendering the decision of the court sustained all the judgments against Van Zandt and denied that the law of 1793 was opposed to either the Constitution or the Ordinance of 1787.[53]

At last the people of Kentucky had secured a firm ruling from the highest judicial authority on the force of the existing laws. Cold reason in the light of that day, apart from all anti-slavery propaganda, justified them in making these demands. Henceforth, there was no doubt about the legality of their position—it was a question merely of the illegal opposition to the return of fugitives from the States to the North. The Troutman case and many others, however, had served as an index of northern sentiment in the matter, for the troubles of the Kentucky slaveholder were just beginning. A year later, in 1848, a requisition was issued on the Governor of Ohio for the return of fifteen persons charged with aiding in the escape of slaves. Imagine the feeling in Kentucky when Governor Bell of Ohio positively refused to give these persons up, stating that the laws of

[53] 5 Howard's Reports, 215–232.

Ohio did not recognize man as property. It was apparently a political move on his part, for there was no question of the property conception of slavery involved whatsoever. He acted in direct opposition to the laws of his State enacted in 1839 and to the federal fugitive slave law of 1793.

After two decades of struggle the abolitionists had come into their own and it was almost impossible to recover slaves who had run away in spite of the legal machinery that had been set up. Furthermore, the more extreme abolitionists had disregarded all law, orders and rights of private property and had even gone so far as to proclaim that there was a "higher law than the Constitution." Against such a powerful foe the forces of all parties in Kentucky united in a firm stand, demanding more stringent measures. The Supreme Court had decided that the existing law was sufficient to recover fugitives and to demand and secure damages for the interference with that right. With the coming of new conditions, however, it was realized on all sides that new and most extreme measures were necessary.

The existing circumstances are well shown by the attitude of Henry Clay, senator from Kentucky as well as author of the Compromise of 1850. Noted for his leanings towards the North, throughout his public career of more than half a century, and as far back as 1798 the advocate of gradual emancipation in Kentucky, he felt called upon in this crisis to express the irritation of his own people:

> I have very little doubt, indeed, that the extent of loss to the state of Kentucky, in consequence of the escape of her slaves is greater, at least in proportion to the total number of slaves that are held within that commonwealth, even than in Virginia. I know full well, and so does the honorable senator from Ohio know, that it is at the utmost hazard and insecurity to life itself, that a Kentuckian can cross the river and go into the interior to take back his fugitive slave from whence he fled. Recently an example occurred even in the city of Cincinnati in respect to one of our most respectable citizens. Not having visited Ohio at all, but Covington, on the opposite side of the river, a little slave of his escaped

over to Cincinnati. He pursued it; he found it in the house in which it was concealed; he took it out, and it was rescued by the violence and force of a negro mob from his possession—the police of the city standing by, and either unwilling or unable to afford the assistance which was requisite to enable him to recover his property.

Upon this subject I do think that we have just and serious cause of complaint against the free states. I think they fail in fulfilling a great obligation, and the failure is precisely upon one of those subjects which in its nature is the most irritating and inflaming to those who live in the slave states.[54]

The Fugitive Slave Law of 1793 was superseded by that of 1850 by a sort of political bargaining on the other measures of the Compromise. The letter of the new law was not much different from the one of 1793—the chief changes being in the exaction of severer penalties and the transfer of jurisdiction to the federal courts. But even if members from the North did vote for the new provision there was no public sentiment in the North back of its enforcement. Everyone in Kentucky was heartily in favor of it, but that mattered little. The effectiveness of any fugitive slave law depended upon the spirit in which it was met in the North, for it was there that the law was to be applied. It remained for a more or less forgotten decision of the Supreme Court in 1861 to show the greatest weakness of all laws for the recovery of runaway slaves in the North.

In October, 1859, the Woodford County (Kentucky) grand jury returned an indictment against Willis Lago, a free Negro, charging him with the seduction and enticement of Charlotte, a Negro slave, from her owner, C. W. Nickols. A copy of this indictment certified and authenticated according to the federal law was presented to the Governor of Ohio by the authorized agent of the Governor of Kentucky and the arrest and delivery of the fugitive from justice demanded. The Governor of Ohio referred the matter to the Attorney-General of the State and upon his

[54] Colton, Reed and McKinley, *Works of Henry Clay*, Vol. 3: 329.

advice the chief executive refused to deliver up the Negro. The Supreme Court having original jurisdiction in suits between two States, the demand for a mandamus to compel the Governor of Ohio to deliver Lago to the Kentucky authorities was heard by that body in a suit under the title of Kentucky *vs.* Dennison (the Governor of Ohio). The decision of the court was rendered by Chief Justice Taney and it contained five important statements: (1) "It was the duty of the executive authority of Ohio upon the demand made by the Governor of Kentucky, and the production of the indictment, duly certified to cause Lago to be delivered up to the agent of the Governor of Kentucky, who was appointed to demand and receive him." (2) "The duty of the Governor of Ohio was merely ministerial, and he had no right to exercise any discretionary power as to the nature or character of the crime charged in the indictment." (3) "The word 'duty' in the act of 1793 means the moral obligation of the state to perform the compact, in the Constitution, when Congress had, by that act, regulated the mode in which the duty should be performed." (4) "But Congress cannot coerce a state officer, as such, to perform any duty by act of Congress. The state officer may perform if he thinks proper, and it may be a moral duty to perform it. But if he refuses, no law of Congress can compel him." (5) "The Governor of Ohio cannot, through the judiciary or any other department of the general government, be compelled to deliver up Lago; and upon that ground only this motion for a mandamus is overruled."[55]

This decision came as a fitting climax to the legal history of the fugitive slave problem as it concerned Kentucky. Such an interpretation placed by the highest judicial authority upon an act of Congress which had stood throughout the slavery era in Kentucky showed beyond any doubt whatever that the legal battle over slavery questions was at an end. If any solution was to be found in the future it would not be in the legislative halls nor in the court room.

[55] 24 Howard's Reports, 109–110.

Emancipation was an important question closely connected with that of the fugitive. This was one of the problems to be discussed in the Constitutional Convention of 1792. There were some few members who were in favor of immediate liberation and others inclined towards a scheme of gradual release of the Negro from bondage. But, as has been shown in the early part of this chapter, the group in favor of the existing institution easily dominated the convention and drew up the famous article IX, which remained without change throughout the slavery era as a part of the fundamental constitutional law. It is significant that it was provided that the legislature should have no power to pass laws for the emancipation of slaves without the consent of their owners, or without paying their owners, previous to such emancipation, a full equivalent in money, for the slaves so emancipated: that the legislature should not pass laws to permit the owners of slaves to emancipate them, saving the rights of creditors, and preventing them from becoming a charge to the counties in which they resided.

From a purely objective viewpoint it is doubtful if a fairer legal guide for the institution of slavery in relation to the rights of emancipation could have been drawn up. On one side, it prevented the State authorities from depriving a slaveholder of his property without due compensation. On the other hand, no unscrupulous master was to free his old and invalid slaves and thereby inflict the burden of their support upon the community as a whole. But this constitutional provision had no legal force in itself. It was to serve as a guide for the enactment of statute laws later.

The State assembly on December 17, 1794, proceeded to the enactment of the first emancipation law of the State. The contents of Article IX of the Constitution were carefully followed and the detailed legal code of emancipation laid down in these words:

> It shall be lawful for any person by his or her last will and testament, or by any other instrument in writing, under his or her

hand and seal, attested and proved in the county court by two witnesses, or acknowledged by the party in the court of the county where he or she resides, to emancipate or set free his or her slave or slaves: who shall thereupon be entirely and fully discharged from the performance of any contract entered into during servitude, and enjoy as full freedom as if they had been born free. And the said court shall have full power to demand bond and sufficient security of the emancipator, his or her executors or administrators, as the case may be, for the maintenance of any slave or slaves that may be aged or infirm, either of body or mind, to prevent their becoming chargeable to the county. And every slave so emancipated shall have a certificate of freedom from the clerk of such court on parchment with the county seal affixed thereto, for which the clerk shall charge the emancipator five shillings; saving, however, the rights of creditors and every person or persons, bodies politic and corporate, except the heirs or legal representatives of the person so emancipating their slaves.[56]

This law remained throughout the slavery period in Kentucky and the only changes which were ever made in it were in the minor details to untangle some legal ambiguities. The law of 1823, however, is important in showing the discrepancies of the original provisions. By this amendment it was enacted that when the county courts received proof or acknowledgment of a deed of emancipation, or of a will emancipating slaves, they were to note on their record a description of any such slaves. The certificate of freedom which was given to the Negro was also to contain this description and no other certificate was to be issued except on the presentation of proof that the first one had been lost or when such was required for use as evidence in some suit. If any slave thus liberated was found to have presented his certificate to another still held in bondage with a design of freeing him, the emancipated slave was to suffer severe penalties.[57] These added provisions apparently came to fill all the gaps in the previous law and no further amendments of importance were needed to make the laws of emancipation run smoothly.

[56] *Littell's Laws*, 2: 246–247.

[57] Session Laws, 1823, p. 563.

Of all the many slavery cases which were brought before the Court of Appeals in the next thirty years it is interesting to note that nearly all of them concerned themselves more or less with the question of freedom. The very fact that they reached the highest court is also conclusive evidence that the law was not quite as clear as one would at first suppose. Close study of the findings of the court will show that the judiciary was always consistent in its interpretation of the law and that most of the cases were carried up from the lower courts because of disputes between the heirs of an estate and the administrator as to their precedence in the matter of slaves. This part of the controversy concerned itself with the property conception of the slave, whether he was real or personal estate, which was discussed earlier in this chapter. The purely emancipation cases before the Court of Appeals divide themselves into three parts: (1) those which concerned the interpretation of the statute law, (2) those suits for freedom which were based on the question of residence and (3) those which involved persons detained as slaves.

Most of the first class of cases concerned themselves with the emancipation of slaves by will. The number of slaveholders who freed their Negroes during their own lifetime seems to have been very small. On the other hand, from a study of the slave cases in court it appears to have been a very common thing for an owner to provide for the freedom of his slaves in his will. The right of a master to dispose of his own property was beyond dispute, but, as is often the case, the heirs were seldom satisfied and they brought the will into court on one or more technical grounds in an attempt to break the document which freed so much valuable property. The court in every case held that the right of the owner was absolute and that if by the letter of his will his slaves were freed, that right was subject to no dispute. Furthermore, when the Negroes were thus emancipated they did not pass to the personal representatives of the deceased, as assets. They passed by will just as land, and the devise took effect at the death of the

testator, whether it be a devise to the slave, of his freedom, or of the slave, to another. The servant, thus affected, had only to appear before the county court and establish his emancipation. This accomplished, it was the duty of the court to give him a certificate of freedom without the consent of the representatives of the emancipator.[58] The right of disposal rested with the owner, who could emancipate by act, or by will, and he who denied the right or placed any claim against it was compelled to show the prohibition.[59]

While the owner had absolute powers of disposal of his own slaves he could not draw up a will of prospective freedom which would hold in spite of the rights of his heirs. If a master desired to be very lenient with his servants, he had to make their freedom absolute and in writing. This was well brought out in the case of an apparently kind-hearted Kentucky slaveholder who provided in his will that his slaves were to select their own master without regard to price. They chose as their future owner a man who did not need them, but who offered to take them at about half their real value. The court held that in such a case the executor was not bound to accept the offer, since the interests of those entitled to the proceeds of the sale, as well as the desire and comfort of the slaves, were to be regarded.[60] Another owner had the right idea, but defeated his own intentions by willing all his forty slaves to the Kentucky Colonization Society. The court held that such an act by no means freed the slaves and that by the laws of the State until they were free they could be hired out and the proceeds considered as a part of the estate.[61]

As in all border States there were many legal battles for freedom, which involved the question of residence on free soil. These cases were largely concerned with the question of the right of a citizen of Kentucky to pass through a free State on business or pleasure attended by his slaves or

[58] Black *vs.* Meaux, 4 Dana, 189.

[59] Susan *vs.* Ladd, 6 Dana, 30.

[60] Hopkins *vs.* Morgan's executor, 3 Dana, 17.

[61] Isaac et al. *vs.* Graves' executor, 16 Ben Monroe, 365.

servants without losing his right of ownership over such slaves. The principle involved was early considered in the Kentucky Court of Appeals and faithfully carried out in succeeding generations, viz.: that a "fixed residence" or being domiciled in a non-slaveholding State would operate to release the slave from the power of the master; but that the transient passing or sojourning therein had no such effect. In an early case in 1820 involving a suit for freedom the court held that a person of color from Kentucky who was permitted to reside in a free State could prosecute his right to freedom in any other State. It was held to be a vested right to freedom, which existed wherever he went.[62] In another instance an owner permitted his slave to go at large for twenty years, but the court held that that alone did not give him freedom. Still under this liberty of movement the slave went off into a free State to reside and the court held that the Negro was then free because his right grew out of the law of the free State and not out of that in which the owner resided.[63] An owner permitted his slave to go to Pennsylvania and remain there for a longer period than six months, with a knowledge of the law passed in that State in 1780, and the Kentuckv Court of Appeals held that the slave was entitled to his freedom and that even if the slave had returned to Kentucky his right could be asserted there just as well as in Pennsylvania.[64] But should a slave go with his master to a free State and later return to Kentucky with him, whatever status he had then was to be determined by the law of Kentucky and not by the rule of any State where the slave might have been.[65] The fact that a slave stayed in New York for three months before his return to Kentucky, his owner knowing he was there, and making no effort to bring him away, did not give to such slave a right to freedom.[66] A slaveholder sent one of his

[62] Rankin *vs.* Lydia, 2 A. K. Marshall, 467.
[63] 15 Ben Monroe, 328.
[64] 14 *Ibid.*, 355.
[65] 12 *Ibid.*, 542.
[66] 4 Metcalfe, 231.

servants over into Illinois to cut some wood for a few weeks and later the latter brought suit for freedom on the grounds of residence in a free State but the court denied any such right, since the slave returned to his master in Kentucky voluntarily.[67]

If an emancipated Negro for any reason was held in slavery and later established his right to freedom in court, he could not recover compensation for his services or damages for his detention, unless he could prove that he was held under full knowledge of his right or with good reason to believe him free. If pending his suit for freedom he should be hired out by order of the court, the net hire was to be awarded to him if he succeeded.[68]

The actual number of manumissions which took place in Kentucky will no doubt never be known. Among the few statistics are those of the federal census for 1850 and 1860 and they include only the figures for the one census year. According to this source in 1850 only 152 slaves were voluntarily set free in the State or one slave out of every 1,388, a percentage of only .072; and in 1860 there were 176 Negroes recorded as freed or one out of every 1,281 slaves, a percentage of only .078. We can easily assume from the accounts which we have from papers of that time that these numbers were far short of those that were really set free by their masters. It was the custom of many owners who were about to free their slaves to take them to Cincinnati and there have them set free in the Probate Court.

Early in 1859, forty-nine slaves from Fayette County, mostly women and children, were brought to Cincinnati and set free and later sent to a colony of emancipated Negroes in Green County, Ohio.[69] In March of the same year Robert Barnet of Lincoln County, Kentucky appeared with eighteen slaves—a father, mother, nine children and three grandchildren and another woman and four boys, who were all emancipated in the Cincinnati Probate Court. Before

[67] 11 Ben Monroe, 210.
[68] 4 Dana, 589, 7 Dana, 360.
[69] *American Anti-Slavery Society Report*, 1859, p. 79.

crossing the Ohio, while in Covington, he was offered $20,000 for all of them but he stated that he would refuse even $50,000.[70] In January, 1860, William McGinnis, of Bourbon County, appeared with fourteen slaves before the same probate court and set them all free.[71]

The law of Kentucky plainly provided that no slave was to be emancipated unless bond were given that he would immediately leave the State. Hence it was but natural that a master who intended setting his slaves free should take them as slaves to a free State and there give them their freedom, thus satisfying his own conscience and at the same time removing any future legal trouble that might ensue on account of his former slaves being found in the State of Kentucky. For this reason it would seem that a large number of the kind-hearted slaveholders who freed their slaves did so outside the bounds of Kentucky and thus that State was deprived of the credit for many emancipations which took place voluntarily at the hands of her own slaveholders.

[70] *Weekly Free South* (Newport), March 4, 1859.

[71] *American Anti-Slavery Society Report*, 1860, p. 44.